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Before the
Federal Communications Commission
Washington, DC 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of	)	
	)	
Definition of Radio Markets	)	MM Docket No. 00-244
	)	

COMMENTS OF THE
NATIONAL ASSOCIATION OF BROADCASTERS

NATIONAL ASSOCIATION OF
BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

David Gunzerath, Ph.D.
NAB Research and Planning

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Executive Summary

The National Association of Broadcasters ("NAB") submits these comments in response to the *Notice of Proposed Rulemaking* ("*Notice*") seeking comment on whether and how the Commission should modify the way in which it determines the dimensions of radio markets and counts the number of stations in them. NAB urges the Commission to proceed cautiously in acting to alter its long-standing methodologies for defining radio markets, for counting stations in them, and for determining the number of radio stations owned by an entity in a market for purposes of applying the multiple ownership rules.

As an initial matter, the alteration of the Commission's radio market rules and policies may be contrary to congressional intent. Because Congress in the 1996 Telecommunications Act specifically addressed the question of local station ownership limits and did not revise or repeal the Commission's interpretation of what constitutes a radio market, then that interpretation should, under well-established case law, be regarded as the one intended by Congress. The Commission must in particular refrain from changing its market definition so as to effectively cut back on the radio station ownership levels that Congress expressly set in 1996.

It also remains unclear whether modifying the FCC's long-standing radio market methodologies would, as a practical matter, eliminate perceived anomalies or enhance the consistent and predictable application of the multiple ownership rules. Due to the scattered location of radio stations and their widely varying signal strength and coverage areas, NAB doubts that a perfect, anomaly-free method of defining radio markets could ever be formulated. Moreover, changing the Commission's approach at this juncture would create other competition and fairness problems, especially with regard to the

grandfathering of existing station combinations and the transfers of existing groups pursuant to any modified rules. For these reasons, the Commission should consider carefully before discarding its methodology for defining radio markets, which was originally adopted nearly a decade ago because it served the FCC's core concerns of competition and diversity better than other possible approaches.

Above all, NAB urges the Commission to reject its proposal to adopt Arbitron radio metro market definitions. The Commission has twice previously considered and rejected the use of Arbitron market definitions as a regulatory tool, and NAB believes these earlier decisions were correct. Approximately half of all radio stations in the United States are not located in Arbitron markets, so adoption of Arbitron market definitions would at best provide only half a solution to the problem of defining radio markets. Arbitron data also lack the neutrality and consistency needed for data to be used as a regulatory tool. In sum, because the sole purpose of Arbitron is to serve advertisers, using Arbitron data to define the number of radio stations in a market for purposes of the FCC's multiple ownership rules is tantamount to attempting to fit a square peg into a round hole.

The Commission has also failed to present a persuasive case for rejecting its current approach for defining radio markets in favor of any of the other proposed options, as the *Notice* did not explain how those options would better serve core competition and diversity concerns. With regard to the counting consistency issue raised in the *Notice*, the Commission has failed to explain its reasons for originally adopting the counting methodology that produces the consistency question, why those reasons no longer obtain, and which proposed option for resolving the perceived inconsistency would better serve the Commission's diversity and competition goals. The available evidence indicates that one of the proposals for resolving the apparent inconsistency would potentially create significant new anomalies in the counting of stations that any single entity is deemed to own in a market.

Finally, if the Commission were to alter its market definition policies in any way, the Commission will clearly need to address the issues of grandfathering and transferability. Any new market definition rules adopted should not be applied retroactively to existing station combinations. The Commission should also refrain from requiring group owners to break up their station combinations upon transfer, even if the application of any revised market definition would make an existing station group exceed the multiple ownership limits.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
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Definition of Radio Markets	)	MM Docket No. 00-244
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TO: The Commission

COMMENTS OF THE NATIONAL ASSOCIATION OF BROADCASTERS

The National Association of Broadcasters ("NAB")[1] submits these comments in response to the Commission's *Notice of Proposed Rulemaking* in this proceeding.[2] The *Notice* sought comment on whether and how the Commission should modify the way in which it determines the dimensions of radio markets and counts the number of stations in them. The Commission also requested comment on whether and how it should amend the method by which it determines the number of radio stations owned by an entity in a radio market for the purpose of applying the multiple ownership rules.

NAB believes that the Commission should proceed cautiously before altering its well-established methodologies for defining radio markets and counting stations in them. As an initial matter, the alteration of these policies may be contrary to congressional intent. Because Congress did not revise or repeal the Commission's methods of defining radio markets and counting stations when it addressed radio station ownership in the 1996 Telecommunications

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[1] NAB is a nonprofit, incorporated association of television and radio stations and broadcast networks which serves and represents the American broadcast industry.

[2] *Notice of Proposed Rulemaking* in MM Docket No. 00-244, FCC 00-427 (rel. Dec. 13, 2000) ("*Notice*").

Act, the Commission's existing market definitions and counting methods should be regarded as consistent with congressional intent.

It also remains unclear whether altering the Commission's long-standing radio market methodologies would, as a practical matter, eliminate perceived anomalies or enhance the consistent and predictable application of the multiple ownership rules. NAB doubts that a perfect, anomaly-free method of defining radio markets could ever be formulated. Moreover, changing the Commission's approach at this juncture would create other competition and fairness problems, especially with regard to the grandfathering of existing station combinations and to the protection of the legitimate expectations of group owners upon the transfer of existing combinations. For these reasons, the Commission should consider carefully before discarding its long-standing contour overlap method for defining radio markets, which was originally adopted because it served the Commission's core concerns of competition and diversity better than other possible approaches.

In particular, NAB urges the Commission to reject its proposal to adopt Arbitron radio metro market definitions. The Commission has twice previously rejected the use of Arbitron market definitions as a regulatory tool, and NAB believes these earlier decisions were correct. As described in detail below, using Arbitron data to define the number of radio stations in a market for purposes of the multiple ownership rules is tantamount to attempting to fit a square peg into a round hole. The sole purpose of Arbitron is to serve advertisers, and Arbitron data consequently lack the neutrality and consistency needed for data to be used as a regulatory tool.

The *Notice* has also failed to present a persuasive case for any other proposed changes to the Commission's radio market definitions and station counting methods. With regard to the counting consistency issue raised in the *Notice*, the Commission has failed to explain its reasons for originally adopting the counting methodology that produces the consistency question, why those reasons no longer obtain, and which proposed option for resolving the perceived inconsistency would better serve the FCC's diversity and competition goals. The available evidence moreover indicates that one of the proposals for resolving the apparent inconsistency would create significant new anomalies in the counting of stations that any single entity is deemed to own in a market.

I. The Commission Must Refrain From Altering Its Radio Market And Station Counting Methodologies In A Manner Contrary To Congressional Intent.

The Commission in 1992 established its current "contour overlap" method of defining radio markets and its method for counting the number of stations in a market.[3] Because, under the radio multiple ownership rules, the number of stations allowed to be commonly controlled in any market depends on the number of stations in the market as a whole, the methodology for defining a radio "market" and for counting the stations in that market becomes significant.

In Section 202 of the Telecommunications Act of 1996 ("1996 Act"), Congress specifically directed the Commission to revise the radio multiple ownership rules to permit a substantial increase in the number of radio stations that may be controlled by a single owner in any local market, depending upon the number of commercial radio stations in that market. But in adopting these increased numerical station ownership limits in 1996, Congress made no changes to the Commission's well-established and well-known methodology for defining radio markets and counting stations in them, and did not even suggest that the Commission should

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[3] *Report and Order* in MM Docket No. 91-140, 7 FCC Rcd 2755 (1992) ("*1992 Order*"), *recon. granted in part, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking* in MM Docket No. 91-140, 7 FCC Rcd 6387 (1992) ("*1992 Reconsideration*").

examine this issue.[4] Because Congress in 1996 specifically addressed the question of local station ownership limits and did not change the Commission's interpretation of what constitutes a radio market, then that interpretation should, under well-established case law, be regarded as "the one intended by Congress."[5] Indeed, as the Commission itself stated in a brief to the U.S. Court of Appeals for the D.C. Circuit just last week, "it can be presumed that Congress is knowledgeable about existing, longstanding regulatory provisions when it enacts new legislation."[6]

As a general matter, therefore, the Commission should be chary of altering any administrative interpretation that has gained the "approval" of Congress.[7] And as Commissioner Furchtgott-Roth and Chairman Powell respectively cautioned in their concurring statements to the *Notice*, the Commission must refrain from changing its "definition of 'markets' in order to

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[4] In its order implementing Congress' directives on radio station ownership, the Commission stated that its market definition and method of counting stations in a market were "unaffected" by the 1996 Act and would "remain in effect." *Order, Implementation of Sections 202(a) and 202(b)(1) of the Telecommunications Act of 1996*, 11 FCC Rcd 12368, 12370 (1996).

[5] *CFTC v. Schor*, 478 U.S. 833, 846 (1986) ("It is well established that when Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the 'congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress.'") (*quoting NLRB v. Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)). *Accord FDIC v. Philadelphia Gear Corporation*, 476 U.S. 426, 437 (1986).

[6] Brief for Respondents, *National Public Radio, Inc., et al. v. FCC*, Nos. 00-1246, 00-1255 at 20 (D.C. Cir. filed Feb. 20, 2001).

[7] *Casey v. Commissioner of Internal Revenue*, 830 F.2d 1092, 1095 (10th Cir. 1987) ("When Congress is, or should be, aware of an interpretation of a statute by the agency charged with its administration, Congress' amendment or reenactment of the statutory scheme without overruling or clarifying the agency's interpretation is considered as approval of the agency interpretation.") *See also Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change").

cut back on the concentration levels that Congress expressly set" in the 1996 Act[8] and consequently "effectuate a different result than Congress intended."[9] Indeed, the *Notice* (at ¶ 12) did recognize that the adoption of any overly restrictive definition of a market might "inappropriately thwart the relaxation of the ownership rules that the 1996 Act contemplated." The Commission should accordingly examine all of its proposed options for the effect that their implementation would have on station ownership in the radio marketplace. Any definitional changes as to what constitutes a market, or how stations are to be counted in a market, that would alter express congressional intent on radio station ownership must be rejected, particularly in light of Congress' "approval" of the Commission's existing market definitions. *Casey*, 830 F.2d at 1095.

II. Given The Difficulty Of Formulating A Perfect Definition Of Radio Markets, Any Altered Definition Adopted At This Juncture Would Likely Produce New Anomalies And Would Create Other Competition And Fairness Problems.

A. No Anomaly-Free Method of Defining Radio Markets Can Likely Ever Be Found.

As an initial matter, NAB wants to emphasize that certain characteristics of radio stations militate against finding a perfect, anomaly-free method of defining radio markets. Radio stations vary widely in their signal strength and, consequently, in their coverage areas. Compared to television stations, which are concentrated in or near population centers, radio stations are much more scattered in location. These characteristics of radio stations make it difficult to find a "neat and tidy" geographic definition for radio markets. For example, a Gaithersburg, Maryland station with a powerful signal and large coverage area may be a competitor for advertising and listeners with a radio station located in the District of Columbia, even though the signal of that

[8] *Notice*, Separate Statement of Commissioner Harold W. Furchtgott-Roth.

D.C. station does not reach Gaithersburg. In addition, there may be a smaller, less powerful station in Gaithersburg that serves only its immediate area and that provides competition for the large Gaithersburg station only within Gaithersburg (and which does not compete at all with the District of Columbia station). Still another radio station in Gaithersburg may serve nearby Maryland communities such as Frederick, and provide competition to stations located in and primarily serving Frederick.

Given the scattered location of stations and their widely varying signal strength and coverage areas, defining radio markets in terms of contour overlap does seem the preferable general approach for identifying radio stations that actually compete with one another. But due to these characteristics of stations, any radio market definition – including the current one – will produce a certain number of anomalies. Consequently, replacing or modifying the current methods for defining markets and counting stations in them will likely result in the production of new and different anomalies. Because it is impossible to foresee how any new market definition and counting method would operate in every situation, there can be no guarantee that a new methodology would ultimately produce fewer anomalies than the Commission's current approach.[10]

Moreover, the Commission should not exaggerate the extent of the anomalies produced by its current regulatory approach. Especially in comparison to the thousands and thousands of station transfers that have occurred since 1992, the number of cases in which application of the FCC's current market definition and counting methods has produced serious anomalies must be quite small. For example, the *Notice* (at ¶¶ 5, 12) addressed the perceived problem with

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[9] *Notice*, Concurring Statement of Commissioner Michael K. Powell.

increasing the number of stations regarded as being in a radio market by counting "distant" signals that may overlap only the largest principal community contour among the stations whose contours define the relevant market. Yet on how many occasions does counting one or more distant signals actually increase the total count of stations in the market so that a proposed transaction is evaluated under a higher ownership tier?[11] And even if counting distant signals were to raise the tier applicable to a transaction, the effect may be surprisingly limited.[12] Although the *Notice* (at ¶ 5) cited a few cases in which counting "distant" signals did result in raising the applicable ownership tier, the *Notice* contained no information as to the actual scope of the problem, especially in comparison to the extremely large number of radio transactions that have occurred since 1992.

Similarly, the *Notice* (at ¶ 9) contained no information as to the frequency in which the counting consistency question has actually resulted in an entity obtaining control of more stations in a market than would otherwise be allowed under the station ownership limits.[13] The

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[10] Indeed, the Commission has noted that the anomalies in its existing policies – which were adopted in 1992 – did not become "clearly discernible" until after passage of the 1996 Act. *Notice* at ¶ 7.

[11] After all, it makes no difference under the 1996 Act if this counting method were to raise the number of radio stations in a market from 45 to 60, or from 15 to 29, or from 30 to 44, because the ownership tier applicable to the transaction would not change.

[12] For example, in a market with only 15 stations, one entity may own four FM stations, which is the same number of FM stations allowed in a market with between 30 and 44 stations and which is only one less FM than a single entity may own in the very largest radio markets with 45 or more stations. *See* 47 C.F.R. § 73.3555(a)(1).

[13] This counting consistency (or "numerator/denominator") issue arises from an apparent inconsistency in the way the Commission counts the number of stations in a market and the number of stations in the market that any entity will own. To determine the total number of stations in the market, the FCC counts all stations whose principal community contours overlap the principal community contour of any one or more of the stations whose contours define the market. But to determine the number of stations that any single entity is deemed to own in a

Notice (at ¶ 8) discussed only one case in this regard, and, again, did not attempt to estimate the extent of the perceived problem.

Given that the actual scope of the apparent anomalies in the FCC's current market definition policies remains limited or unclear, the Commission should be cautious of altering its current methodologies for defining radio markets and counting stations in them. Any new or modified market definition would inevitably produce its own anomalies, which could ultimately prove more serious than the perceived anomalies in the Commission's current methodologies.

B. Changing the Commission's Current Market Definition at this Juncture Would Clearly Cause Significant Competition and Fairness Problems.

Beyond the likely production of new (and as yet unknown) anomalies, the adoption at this time of a different method for defining radio markets would clearly raise substantial competition and fairness issues. Since the Commission's adoption of its current market definition, and particularly since the liberalization of the radio ownership rules in 1996, thousands of radio stations have been bought and sold, and significant consolidation in the radio industry has occurred. If the Commission were at this juncture to alter its radio market definition so as to effectively cut back on the level of consolidation permitted in the future, then permanent competitive imbalances would be created in a number of markets.

Assume, for example, that one entity has already purchased in an area the maximum number of stations permitted under the 1996 Act. But if the Commission were to redefine radio markets so that effectively less consolidation is allowed, then the "early consolidator" has gained a permanent competitive advantage over other station owners in that area because they will not be permitted to obtain in the future as many stations as currently controlled by the grandfathered

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given market, the FCC counts only those stations whose principal community contours overlap the common overlap area of all of the stations whose contours define the market.

early consolidator.[14] Changing the Commission's market definition rules after so much consolidation has already occurred may therefore freeze significant competitive imbalances in a number of radio markets. NAB submits that this result is unfair to radio station owners who are not the early consolidators, and fails to serve the Commission's interest in promoting vigorous competition in the radio industry.[15]

Although the *Notice* (at ¶ 13) correctly concluded that "[t]here is no reason to disturb" existing station combinations, the *Notice* did not clearly address how the Commission would treat existing combinations when they are transferred or assigned in the future. Assuming, however, that the Commission might not permit the future transfer of an existing station combination, if such transfer would be inconsistent with the multiple ownership rules under a revised market definition, then additional fairness problems would be created. Requiring the break up of station groups upon their transfer would clearly cause substantial difficulty for station owners because commonly owned stations generally have consolidated operations, personnel and equipment. The adoption of a new radio market definition following the recent consolidation in the radio industry will therefore raise difficult fairness questions in the treatment of group owners that have consolidated their stations' operations with the reasonable expectation that these stations could be transferred as a group. In many instances, the price that was paid for these stations represented their value as part of a consolidated group, a value that might not be

[14] The *Notice* (at ¶ 13) clearly indicated that existing station combinations would be grandfathered.

[15] There is, moreover, no obvious solution to this problem. As the *Notice* (at ¶ 13) recognized, there is "no reason to disturb" existing ownership combinations that "were granted as being in the public interest and in accordance with applicable Commission rules and policies." Although existing combinations must be grandfathered to avoid unfairness to station owners and disruption in the industry, this grandfathering will nonetheless produce competitive imbalances unfairly

obtainable if the stations could not be transferred together. If the Commission at this juncture determines to alter its radio market definition and station counting method, then it will be forced to address the unfairness inherent in applying these changed rules to owners who created station groups in reasonable reliance on the Commission's long-standing and apparently settled methods of applying the multiple ownership rules.

C. The Current Method of Defining Markets Was Adopted Because It Served the Commission's Competition and Diversity Concerns Better Than Other Possible Approaches.

As described above, changing the Commission's market definition and station counting method at this juncture would create competition and fairness problems and would produce additional anomalies, the extent of which would not be immediately known. Given these various complications, the Commission should be cautious of altering its existing approach to defining markets, which was originally adopted because it best served the Commission's competition and diversity concerns.

In the *1992 Reconsideration*, the Commission expressly concluded that its contour overlap method of defining radio markets and counting stations in them "address[ed] our core concerns of competition and diversity." 7 FCC Rcd at 6395. The Commission stated that this approach would reflect the "actual options available to listeners" and "market conditions facing the particular stations in question." *Id.* Interestingly, the Commission concluded that its "standard based upon the existence of overlapping principal community contours" would

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favoring the early consolidators, if the Commission now changes its rules to effectively reduce the level of future consolidation.

"likely" be "conservative in counting the number of stations receivable by listeners." *1992 Order*, 7 FCC Rcd at 2779.[16]

Despite the existence of certain anomalies in the Commission's current methodology, nothing in the *Notice* undermines the validity of the Commission's general approach of utilizing contour overlaps to define radio markets and to count stations in them. Indeed, the scattered location and widely varying signal strength and service areas of stations would make defining radio markets in terms of contour overlap seem the preferable approach for identifying stations that actually compete with each other. Clearly if the contours of two radio stations overlap, then those stations should be regarded as competing against each other for advertising and for listeners, especially within the overlap area.[17] The Commission should accordingly consider carefully before discarding its long-standing methodology for defining radio markets, as an approach based on station contours still appears to best serve core competition and diversity concerns.

Indeed, NAB observes that the *Notice* generally failed to analyze the effect of any of the FCC's proposed market definition modifications on the Commission's "core concerns of competition and diversity." *1992 Reconsideration*, 7 FCC Rcd at 6395. Rather than attempting to determine how changing market definitions would actually promote these basic concerns, the

[16] Particularly in rural areas where there were relatively few stations, and thus relatively low levels of daytime interference, the Commission thought that listeners might be able to receive AM and FM signals beyond the predicted contours. "Hence, there are likely to be more signals available to the average listener in such a market than the number of signals that would be counted by this methodology. The level of competition is therefore likely to be higher than the overlap numbers might suggest." *1992 Order*, 7 FCC Rcd at 2779.

[17] Thus, the Commission's questioned practice of not counting against an applicant's ownership allowance in a given market a station it owns that fails to provide a signal to the common overlap area (*i.e.*, the primary area of competition) may be more readily defended than the *Notice* implied.

Notice seemed to focus on how manipulating station counts would allow more or fewer transactions.

The proposed resolutions to the "numerator/denominator" question epitomize the Commission's failure to analyze its options in light of its competition and diversity goals. To resolve this perceived inconsistency in the way it counts the number of stations in a market and the number of stations that any entity is deemed to own in a market, the Commission proposed either "adding" to the "numerator" or "subtracting" from the "denominator."[18] Although the *Notice* set forth these two options, it failed to discuss how either would affirmatively serve the FCC's competition and diversity goals. And certainly the *Notice*'s failure to analyze *which* of these options would better promote the FCC's goals is striking, as the marketplace impact of the numerator/denominator issue appears to vary depending on which of the proposed "fixes" is actually applied.[19]

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[18] In other words, the *Notice* (at ¶ 9) proposed to "count against an applicant's ownership allowance in a given market **any** station that it owned and that was included in determining how many stations were 'in the market' for purposes of assessing compliance with the local radio ownership rules." As an alternative to "fixing the numerator," the *Notice* also suggested "exclud[ing] from the count of the number of stations in a market, any stations owned by the applicant, except the commonly owned stations that form the market" (*i.e.*, "fixing the denominator").

[19] The second alternative (*i.e*, "fixing the denominator") would likely have the lesser impact on future transactions because reducing the count of stations in a market would not frequently result in a proposed transaction being evaluated under a lower ownership tier. The attached market definition study in fact demonstrates this divergent result. As discussed in more detail below, the numerator/denominator issue was implicated in several of the hypothetical transactions examined, but these hypothesized acquisitions raised a question of compliance under the multiple ownership rules only if the issue was addressed by altering the "numerator" (*i.e.*, adding to the number of stations counted against the potential applicant's ownership allowance). If the "denominator" were "fixed" (*i.e.*, the count of the number of stations in the market reduced), then the hypothesized transactions raised no apparent difficulty under the multiple ownership rules. *See* Attachment A, *An Evaluation of Proposed Changes to the FCC Geographic Market Definition for Radio Acquisitions*, at 15-16 ("*Market Definition Report*").

In sum, without an analysis of the numerator/denominator issue in terms of the Commission's core concerns, the options proposed in the *Notice* amount to little more than number manipulation. NAB accordingly urges the Commission to refrain from altering any of its market definition policies unless and until it can be shown that a modified market definition would better promote competition and diversity than the FCC's current approach.

III. Among The Commission's Proposed Options, The Most Radical Is The Most Inappropriate.

Particularly in light of the various problems and issues described above, the Commission has failed to make a persuasive case for any of the suggested changes set forth in the *Notice*, including the varying options proposed to address the "numerator/denominator" issue. Taking the most radical proposed action – entirely discarding the current contour overlap approach in favor of a commercial market definition like Arbitron – would clearly be a cure much worse than the disease.

A. For a Variety of Reasons, the Commission Should Reject the Use of Arbitron Market Definitions as a Regulatory Tool.

1. Use of Arbitron Would Be Contrary to Congressional Intent.

As Chairman Powell expressly noted in his concurring statement to the *Notice*, the "effect of eliminating" the Commission's current method for defining markets and "replacing it with a commercially defined market (such as Arbitron) would be to shrink markets, and thereby substantially limit the number of stations one could own." This proposal would, therefore, according to Chairman Powell, "circumvent specific statutory provisions" of the 1996 Act and "effectuate a different result than Congress intended." *See supra* Section I. The Commission should accordingly decline to adopt its proposal to utilize Arbitron markets on this basis alone.

This effect of cutting back on the ownership levels specifically approved by Congress would be particularly pronounced if the Commission were to utilize Arbitron radio "metro" market definitions, as apparently contemplated in the *Notice* (at ¶ 10). The "metro" is a restrictive market definition that does not even include all stations that receive reportable listening shares within the counties comprising the metro market.[20] For example, according to a recent Arbitron report, only five radio stations are considered "home" to the Reading, Pennsylvania metro market, but an additional 30 stations located outside the counties comprising the metro receive reportable listening shares within the metro counties. *See* Attachment B, *An Analysis of the Proposed Use of Arbitron Data to Define Radio Markets*, at 9-10 ("*Arbitron Report*"). If, utilizing the Arbitron metro definition, markets as relatively large as Reading were treated as only having five radio stations, then the number of stations that any one owner may control would be cut back well beyond the levels that Congress envisioned in the 1996 Act. And the Commission should be aware that markets such as Reading are hardly unique. In the Spring 2000 Arbitron survey period, the "out of market" stations listed as receiving reportable listening shares outnumbered the "home-to-metro" stations in at least 75 markets. *See id.*

The attached market definition study by BIA Financial Network also shows the counter-statutory effects resulting from the adoption of Arbitron to define radio markets for the

[20] As explained in detail below and in the attachments to these comments, stations regarded as "home-to-metro" include (i) stations physically located within the counties comprising the metro market, and which receive Arbitron's minimum reportable listening levels, and (ii) stations physically located outside the counties comprising the metro but that receive the required minimum listening levels within the metro counties *and* that have requested Arbitron to be included in the metro. Any count of reported "home-to-metro" stations accordingly *excludes*: (i) stations receiving the minimum listening levels that are physically located outside the metro counties and that have *not* requested Arbitron to be included in the metro, and (ii) stations, whether physically located inside or outside the metro counties, that do not receive Arbitron's required minimum listening levels.

Commission's regulatory purposes. In five of the eight markets examined, use of the Arbitron "metro" market, rather than the current contour overlap market definition, resulted in the application of a lower ownership tier to the hypothesized transaction, thereby cutting back on the number of stations permitted to be commonly owned under the 1996 Act. *See Market Definition Report* at 6-7, 12-13. For example, under the current contour overlap method of defining a radio market, both "markets" created in Lexington-Fayette, Kentucky by the transaction hypothesized in the *Market Definition Report* would have 46 stations, and a single entity could accordingly own eight stations in both markets. But utilizing the Arbitron metro market definition, the Lexington market would have only 28 stations, and a single owner could control only six stations.[21] Thus, the adoption of Arbitron to define radio markets would, as Chairman Powell recognized, "shrink markets" and "substantially limit the number of stations one could own," in contravention of "specific statutory provisions" of the 1996 Act.

2. Nearly Half of All Radio Stations Are Not Located in Arbitron Markets.

The *Notice* (at ¶ 10) did recognize that not all radio stations are in an Arbitron market, but then noted that "nearly 80 percent of the nation's population" reside in Arbitron markets. The Commission failed, however, to recognize that approximately *half* of all radio stations in the U.S. are not located in Arbitron markets. *See Arbitron Report* at 8. Adoption of Arbitron market

[21] There are, moreover, nine stations located outside of the counties comprising the Lexington "metro" market that nonetheless meet the minimum reporting requirements to be listed in Arbitron's audience ratings report for Lexington. *See Market Definition Report* at 13. If these nine stations were counted as being in the Lexington market, then a single entity could own seven stations in the market. But if the FCC utilized the strict Arbitron metro market definition, these nine stations would be ignored, even though they clearly contribute to the diversity of voices in the Lexington market.

definitions would therefore at best provide only half a solution to the problem of defining radio markets.[22]

Because thousands of radio stations are not located in Arbitron markets, utilizing Arbitron to define radio markets for the Commission's regulatory purposes would also not enhance the consistent and predictable application of the multiple ownership rules. The Commission would obviously have to devise some other method of determining the dimensions of radio markets when the stations involved in a transaction are not located in an Arbitron market. The result of having two completely different approaches for defining radio markets would be overly complicated, would doubtless produce significant new anomalies, and would make application of the multiple ownership rules less clear and consistent. Just as the Commission rejected this complex double system in 1992,[23] the Commission should decline to adopt Arbitron here.

3. Arbitron Data Lack the Neutrality and Consistency Needed for Data to be Used as a Regulatory Tool, and Do Not Adequately Reflect the Commission's Core Concerns of Diversity and Competition.

The Commission has twice previously considered and ultimately rejected the use of Arbitron market definitions as a regulatory tool. In 1992, the Commission reversed an earlier

[22] It is in this and other significant ways that Arbitron markets differ from Nielsen television markets ("Designated Market Areas" or "DMAs"). Each county in the U.S. is assigned to a specific Nielsen DMA based on television viewing patterns within the county, and every television station in the U.S. is located in a specific DMA. In contrast, Arbitron treats some counties and county groupings (the so-called "embedded markets") as being in more than one market, and, of course, about half of the radio stations in the U.S. are in no Arbitron market. Moreover, DMAs are defined exclusively on the measured television viewing patterns within counties, while Arbitron subscriber stations themselves can play a role in defining Arbitron metro markets. *See Arbitron Report* at 7-8.

[23] In the *1992 Order*, the Commission determined to utilize Arbitron markets and to use station contours to define markets for stations not located in Arbitron markets. On reconsideration, however, the Commission rejected this approach, and decided to use a contour overlap standard to define radio markets in all situations. *See 1992 Reconsideration*, 7 FCC Rcd at 6395.

decision to utilize Arbitron data to define radio markets, and adopted its current contour overlap standard instead.[24] In 1995, the Commission proposed and then rejected the use of Arbitron market rankings data to determine regulatory fees for AM and FM stations, concluding that Arbitron rankings are "incomplete" and that "reliance" upon them "does not provide a sufficiently accurate and equitable methodology for determining fees." *Report and Order* in MD Docket No. 95-3, FCC 95-227 at ¶ 54 (June 19, 1995). NAB believes these earlier decisions were correct because Arbitron data lack the neutrality and consistency needed for data to be used as a regulatory tool. Because the sole purpose of Arbitron is to serve advertisers, using Arbitron data to determine the number of radio stations in a market for purposes of the FCC's multiple ownership rules is tantamount to attempting to fit a square peg into a round hole. As discussed in detail below, some of the difficulties presented by use of Arbitron data are inherent in Arbitron's market definition procedures, station reporting criteria, and survey techniques, while other questions are raised with regard as to how the Commission would utilize the Arbitron data.

(a) Arbitron Market Definitions and Data Lack Neutrality.

As set forth in the attached report, Arbitron's market definition process (although recently revised) remains to a notable extent subject to the control of Arbitron subscribers. Under Arbitron's current procedures, modifications to existing Arbitron markets can be initiated by a request from 75% of the subscribing station owners within the market. *See Arbitron Report*

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[24] *See 1992 Reconsideration*, 7 FCC Rcd at 6395. In making this determination, the FCC recognized that Arbitron market definitions changed regularly; that the number of rated radio stations in Arbitron markets fluctuated continually; and that Arbitron tended to both undercount and overcount the number of stations in a market. *Id.* at 6394-95. NAB had opposed the use of Arbitron in this earlier proceeding, and provided the Commission with extensive documentation and studies demonstrating the inappropriateness of utilizing Arbitron as a regulatory tool. *See* NAB, *Petition for Partial Reconsideration and Clarification* in MM Docket No. 91-140 (filed May 29, 1992). Most of the concerns NAB raised in 1992 remain valid.

at 4.[25] Because changes in Arbitron market definitions may be initiated at the request of the very radio station owners that are subject to the Commission's multiple ownership rules, these market definitions lack the neutrality needed for the Commission's regulatory purposes. The Commission's adoption of Arbitron market definitions would provide a clear opportunity for station owners who subscribe to Arbitron to attempt to manipulate Arbitron's market definition process to add (or even delete) counties and stations from Arbitron markets, thereby raising (or lowering) the number of stations that could be commonly owned in a market.[26] Such subscriber influence over the market definition process obviously makes Arbitron markets unsuitable for purposes of applying the multiple ownership rules.

Arbitron data may also lack the requisite neutrality needed by the Commission because Arbitron retains ultimate authority to "delist" or give "below-the-line" status to any station, if that station, in Arbitron's judgment, engaged in any activities with "rating distortion potential." *See Arbitron Report* at 16-17.[27] For example, WNWS-FM in Jackson, Tennessee was given "below-the-line" status in Arbitron's Fall 2000 survey because one of the station's on-air personalities had instructed callers on filling out the diaries that Arbitron uses to measure stations' audiences. *See M Street Daily* at 1 (Feb. 7, 2001). It may be entirely appropriate for Arbitron, a commercial ratings service, to punish stations that allegedly attempt to "distort" their

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[25] These requested modifications typically involve adding a county or counties – and the stations in those counties – to an Arbitron market.

[26] The Commission's adoption of Arbitron market definitions could be particularly disadvantageous for station owners who are not Arbitron clients, because they have no input into the Arbitron client-initiated market redefinition process.

[27] A "delisted" station is one that Arbitron has removed entirely from its reports. If a station is given "below-the-line" status, Arbitron will still list that station, but separately from other stations in its reports and with warnings or disclaimers that Arbitron has found that the station engaged in behavior with rating distortion potential.

ratings in this manner. Clearly, however, the Commission should not rely on Arbitron's listing of rated stations in a market, if stations can be -- and are -- simply removed from Arbitron market reports for perceived commercial misbehavior. Such data obviously lacks the neutrality necessary for data affecting application of the FCC's multiple ownership rules.

(b) Arbitron Market Definitions and Data Lack Consistency.

Utilizing Arbitron data for defining radio markets is also problematic because Arbitron policies allow for the reporting of only those stations that meet certain Arbitron-defined criteria. As an initial matter, Arbitron employs a "Minimum Reporting Standard" threshold to determine whether or not a station will be included (or "listed") in its market reports. *See Arbitron Report* at 12-13. Specifically, Arbitron "counts" only those stations that achieve specific levels of listening, according to the diary entries of those survey participants who fill out and return the diaries to Arbitron. *Id.* This diary-based survey technique inevitably produces a certain level of error, and it is entirely possible that one station could be included in an Arbitron market report in one survey period, while another station could be excluded, simply due to the margin of error associated with the survey measurement techniques. *Id.*[28] While such error levels may be acceptable in determining audience ratings for advertising purposes, such errors would not be acceptable in counting the number of stations in a market for purposes of applying the multiple ownership rules.[29]

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[28] This survey error is compounded by Arbitron's utilization of different survey methodologies in different markets. As detailed in Attachment B, certain Arbitron markets are surveyed more frequently, and more extensively, than others. *See Arbitron Report* at 14. Thus, the degree of error attributed to the survey methods themselves can differ from market to market, depending on the specific methodology used in each case. *Id.*

[29] As discussed in more detail below, Arbitron's practice of counting only those stations that receive a certain minimum listening threshold also results in an "undercount" of the number of stations actually serving a market.

For the above-identified reasons, the total number of radio stations included in Arbitron markets tends to vary from survey period to survey period. Indeed, an examination of recent Arbitron reports shows the number of radio stations in several markets fluctuating to the extent that these markets would fall in lower or higher tiers under the FCC's multiple ownership rules. For example, in the Denver metro market, the Spring 2000 Arbitron report showed 31 radio stations, but the Summer 2000 report counted only 28 stations. *See Arbitron Report* at 15.[30] If the Commission were to utilize this Arbitron measure of the number of stations in a market, then the number of stations that any one entity could permissibly own in a particular market could easily vary from one survey period to the next. Obviously, such a shifting standard would present serious problems for station owners attempting to purchase or sell stations in any particular market.[31] Equally obviously, while such fluctuations may be of little concern to a commercial ratings service, they would present difficulties for the Commission in applying its ownership rules in a rational and consistent manner.

Given Arbitron's use of particular minimum reporting standards and survey techniques, it is also not surprising that Arbitron's count of stations in particular markets varies substantially

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[30] Numerous other markets, including Boston, Seattle-Tacoma, Nassau-Suffolk, Tampa-St. Petersburg, Nashville and Albuquerque, all experienced similar fluctuations across the statutory ownership tiers during recent Arbitron surveys.

[31] Assume, for example, that a station group owner in Denver applied with the FCC to purchase additional stations based on the Spring 2000 survey that showed 31 home metro stations in Denver (which would permit a single entity to control seven stations). However, while the transaction was pending at the FCC, the Summer 2000 Arbitron market survey was released, which showed only 28 home metro stations in Denver (which would allow a single owner to control only six stations). Would the FCC then refuse to approve the pending acquisition because the applicant would be in violation of the multiple ownership rules under the most recent Arbitron measure of the number of stations in the metro market? Such fluctuations could similarly adversely affect an owner who created a station group with the expectation of being able to sell the group as a whole, if the market in which the owner competes were to fall into a lower ownership tier.

from the station counts provided by other prominent industry researchers. For example, disparities between the number of stations counted by Arbitron and by *The M Street Radio Directory* are sometimes marked. *See Arbitron Report* at 5-6 (*M Street* counts nearly double the number of commercial radio stations in Chicago than Arbitron counts).

Moreover, with the advent of streamed radio broadcasts over the Internet, industry sources will likely find it even more difficult to arrive at consistent market counts of radio stations. Assume, for instance, that a streamed radio station located in New York (or in Canada or even Russia) received Arbitron's reportable listening share in a Virginia market. Although current Arbitron policies would allow for the reporting of such a streamed station in the Virginia market if the station received the requisite minimum listening level, would other industry sources agree with this determination? More importantly, how would the Commission consider counting out-of-market (or even out-of-state or out-of-country) streamed stations that may be "listed" by Arbitron?[32] In sum, Arbitron market data – which clearly differ from radio market data provided by other industry sources – lacks the consistency and stability needed for data to be used for the FCC's regulatory purposes.

(c) Additional Anomalies and Counting Problems Would Be Created, Depending Upon the Commission's Use of the Arbitron Data.

The *Notice* was not entirely clear as to how the Commission proposed to utilize Arbitron market definitions and data.[33] As explained in detail below, additional anomalies and counting

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[32] And what if Arbitron were to change its policy with regard to listing streamed stations? Arbitron is currently seeking industry input on how streaming stations should be handled.

[33] For example, Paragraph 10 of the *Notice* specifically referred to Arbitron "metro" market definitions, while the discussion in Paragraph 5 (and footnotes 10 and 11) additionally referred to out-of-market stations. The *Notice* also seemed unclear as to whether the Commission proposed to use the count of Arbitron rated stations in the metro market or the count of all stations physically located in the metro counties.

inconsistencies would be created, depending upon how the Arbitron data and market definitions are used to determine the number of stations in a market. *See Arbitron Report* at 9-11. Indeed, the very range of ways in which Arbitron data could be manipulated to arrive at varying counts of stations in a market further supports NAB's position that Arbitron is not appropriate for the purpose proposed by the Commission.

One alternative for the Commission in utilizing Arbitron data to determine the number of stations in a market would be to count *all* of the commercial radio stations licensed to any community within the counties comprising the Arbitron metro market. This count would include stations not included in Arbitron market reports because they do not meet Arbitron's minimum listening standards.[34] But this count of stations would *exclude* all stations licensed to communities outside the counties comprising the metro, even if those stations were physically located close to the metro, provided a signal to much (or even all) of the metro counties, and received high listening shares within the metro counties. Such stations should clearly be regarded as providing both competition to radio stations located within the metro counties and diversity to listeners within the metro. Thus, this approach to counting stations utilizing Arbitron metro markets would result in an undercount of stations that provide significant competition and diversity in radio markets.

Another approach for the Commission in using Arbitron data would be to count all reported "home-to-metro" stations.[35] This approach would, however, categorically exclude

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[34] If all radio stations licensed to the metro counties were counted by the FCC, then that would lessen the various problems created by Arbitron's survey methodologies. *See supra* Section III.A.3.(b).

[35] As explained in footnote 20, "home-to-metro" stations include: (i) stations physically located within the counties comprising the metro market, and which receive Arbitron's minimum reportable listening levels, and (ii) stations physically located outside the counties comprising the

stations located within the metro counties that do not receive Arbitron's required minimum listening levels (or stations that have been "delisted" by Arbitron for engaging in activities with "rating distortion potential"). *See supra* Section III.A.3.(a). In 1992, the Commission in fact expressly rejected this approach on diversity grounds, finding that "excluding unrated stations from our determination of market size" would "have failed to count stations that serve limited or specialized audiences," thereby underestimating "the full diversity of voices available to listeners in a given locality." *1992 Reconsideration Order*, 7 FCC Rcd at 6395.[36] In addition, this approach would create at least one serious anomaly. Arbitron metro markets include stations physically located outside the counties comprising the metro, only if they receive the required minimum listening level within the metro *and* if they request Arbitron to be included in the metro. *See Arbitron Report* at 10-11. Stations located outside the metro counties are therefore included in the Arbitron metro market for reasons that have nothing to do with the FCC's diversity and competition concerns, but that have everything to do with these stations' commercial self-interest in being treated as part of the metro market. This count of home-to-metro stations also appears inherently arbitrary because one station located outside of the metro counties could be included in the market, while another, very similarly situated station outside the metro could be excluded from the market.

Yet another option for the Commission in using Arbitron data would be to add to the "home-to-metro" count of stations by also counting the stations physically located within the metro counties that do not meet Arbitron's minimum listening threshold. This third approach

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metro but that receive the required minimum listening levels within the metro counties *and* that have requested Arbitron to be included in the metro.

[36] *Accord Memorandum Opinion and Order on Reconsideration* in MM Docket Nos. 91-221 and 87-8, FCC 00-431 at ¶ 44 (rel. Jan. 19, 2001) (even a low rated television station is a "source of

would resolve the diversity problem of undercounting stations within the metro that receive low listener shares, but would leave unresolved the anomalies associated with counting rated, out-of-market stations only if they request to be included in the metro market.

Doubtless there could be additional ways to utilize Arbitron data for the counting of stations in a market.[37] But the three examples set forth above demonstrate that the Commission's proposal to utilize Arbitron data and market definitions raises a host of uncertainties and counting anomalies. Beyond the lack of neutrality and consistency inherent in any use of Arbitron data, this description of the various ways that such data could be used to count stations in a market also shows that Arbitron-based station counts do not take the Commission's diversity and competition concerns fully into account. After all, Arbitron reports are only intended to be used by advertisers and commercial radio stations to determine the value of radio station airtime. Because Arbitron reports and data are solely designed to serve this advertising purpose, it is hardly surprising that use of Arbitron's market definitions would not further the FCC's "core concerns of competition and diversity." 7 FCC Rcd at 6395. The discussion above and in the attached report clearly shows that station contours are a much more neutral method of defining markets – and one that better promotes the FCC's competition and, especially, diversity goals – than utilizing Arbitron data.

B. Utilizing a Different Contour Overlap Standard Would Also Be Problematic.

As an alternative to adopting Arbitron markets, the *Notice* (at ¶ 12) also sought comment on using a different contour overlap standard to determine the number of stations in a market. For example, the *Notice* suggested counting as being in a market only those stations whose

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viable competition and diversity in a given market" and should therefore be considered as a "voice" under the television duopoly rule).

principal community contours overlap or intersect the overlap area of the principal city contours of the stations whose ownership is to be merged. NAB agrees that the Commission should reject this approach for the reason identified in the *Notice* (at ¶ 12) – that this standard would be overly "restrictive" and would "inappropriately thwart the relaxation of the ownership rules" in the 1996 Act. *See supra* Section I.

As the Commission contemplated, research indicates that this more restrictive contour overlap approach would cut back on the ownership levels specifically permitted by statute. In five of the nine markets examined in the attached *Market Definition Report*, use of this different contour overlap standard, rather than the current contour overlap market definition, resulted in the application of a lower ownership tier to the hypothesized transaction, thereby reducing the number of stations permitted to be commonly owned. *See Market Definition Report* at 7, 12-14. For example, under the current contour overlap method of defining a radio market, both "markets" created in Lexington-Fayette, Kentucky by the hypothesized transaction would have 46 stations, and a single entity could own eight stations in both markets. But utilizing the more restrictive contour overlap approach, the two Lexington markets would have only 21 and 40 stations, respectively, and a single owner could control only six stations and seven stations, respectively, in those two markets. Thus, as the Commission specifically stated in the *Notice* (at ¶ 12), utilization of this different contour overlap approach would "inappropriately thwart" Congress' "relaxation of the ownership rules."

NAB also remains skeptical of the alternative proposal to count "only those stations that overlap a certain percentage of the contour of one or more of the mutually overlapping stations." *Notice* at ¶ 12. This proposal seems to raise more questions than it answers. What percentage of

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[37] For example, all stations (whether physically located inside or outside the metro counties) that

contour overlap would be appropriate? On what grounds would one even make such a determination? And would the standard be based on the percentage of the geographic contour or on the percentage of the population within the contour? Not only would selecting a certain percentage of contour overlap without a proper basis be an arbitrary determination, this "percent overlap" standard would also likely produce its own anomalies. *See supra* Section II.A. Given these uncertainties, the Commission should refrain from replacing its well-established contour overlap standard with a "percent overlap" standard.

C. The Commission Has Failed to Justify the Adoption of a Revised Station Counting Method.

In light of the various competition, fairness and other problems raised by any modifications to the Commission's market definition policies at this juncture, NAB does not believe the *Notice* has made a persuasive case for change.[38] With regard to the counting consistency (or "numerator/denominator") question in particular,[39] the Commission has not presented a "reasoned analysis" for "change." *State Farm*, 463 U.S. at 42.

As an initial matter, NAB observes that the *Notice* never even articulated the FCC's reasons for originally adopting the counting methodology that produces the numerator/denominator question, or why these reasons may no longer obtain. Before determining that its existing counting methodology for either the "numerator" or the

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receive Arbitron's minimum listening shares within the metro counties could be counted.

[38] *See, e.g., Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company,* 463 U.S. 29, 42 (1983) ("an agency changing its course . . . is obligated to supply a reasoned analysis for the change beyond that which may be required when an agency does not act in the first instance").

[39] As set forth in detail above, the "numerator/denominator" question arises from a perceived inconsistency in the way the Commission counts the number of stations in a market and the number of stations that any entity is deemed to own in a market. *See Notice* at ¶ 4.

"denominator" is no longer appropriate, the Commission must explain what circumstances have changed and why the reasons for adopting these policies no longer apply.[40]

Moreover, as discussed above, the Commission has failed to analyze which proposed option for addressing the numerator/denominator issue would better serve the Commission's core competition and diversity goals, or, indeed, whether either would serve these goals better than the FCC's current approach. *See supra* Section II.C. The attached market definition study clearly shows that the impact of changing the FCC's station counting methodology to resolve the numerator/denominator question would vary considerably, depending on which of the proposed options is adopted. If the "denominator" were adjusted by reducing the count of the number of stations in a market, then none of the hypothetical transactions examined would raise any question of compliance under the multiple ownership rules. *See Market Definition Report* at 16.[41] In contrast, if the "numerator" were adjusted by adding to the number of stations counted against an applicant's ownership allowance in a market, then six of the hypothesized transactions would raise questions of compliance under the multiple ownership rules. *Id.* at 15. Because the very existence of the numerator/denominator issue seems to depend upon which counting adjustment is made, then perhaps the Commission should conclude that the entire issue amounts to little more than number "fiddling." NAB submits that the Commission should not alter its long-standing station counting methodologies by engaging in mere number manipulation,

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[40] *See, e.g., State Farm*, 463 U.S. at 42; *ACT v. FCC*, 821 F.2d 741, 746 (D.C. Cir. 1987) (court found that the FCC had failed to explain adequately its alteration of a "long-established policy," offering "neither fact nor analysis" to show that "its earlier concerns" were "misguided, outdated or just downright incorrect").

[41] This result is unsurprising, because reducing the count of stations in a market would not frequently cause a proposed transaction to be evaluated under a lower ownership tier.

especially in the absence of any showing that these proposed counting adjustments directly serve core concerns of competition and diversity.

Indeed, NAB believes that the "numerator" option proposed by the Commission to address the numerator/denominator issue would likely produce new anomalies that do not in fact further the FCC's diversity and competition goals.[42] Specifically, this proposed "fix" to the numerator/denominator question would lead to distant stations located in other markets being counted against an applicant's local ownership allowance. For example, in the Binghamton, New York acquisition hypothesized in the *Market Definition Report*, the acquiring station group also owns one station located in Ithaca, New York and one station located in Scranton, Pennsylvania, which would be counted against the local ownership allowance of the applicant acquiring one additional station in Binghamton. NAB wonders why the Commission should change its counting methodology to add to an applicant's ownership allowance in a local market (*e.g.*, Binghamton) stations that the applicant owns in another city (*e.g.*, Ithaca) or even another state (Pennsylvania). *See Market Definition Report* at 15.[43] In comparison, the Commission's current practice of *not* counting against an applicant's ownership allowance in a given market a station it owns that fails to provide a signal to the common overlap area (*i.e.*, the primary area of competition) may be a superior method of gauging the true level of competition and diversity in a local merger transaction.

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[42] As described above, this option involves adding to the number of stations counted against a potential applicant's ownership allowance in a market.

[43] Similarly, in the hypothesized acquisition in Ft. Collins, Colorado, the FCC's proposal to "add" to the count of stations in the "numerator" would have the result of counting stations located in another state (Cheyenne, Wyoming) against the local ownership allowance of the group owner proposing to acquire stations in Ft. Collins. The Sparta, Tennessee market example also produced this anomalous result. *See Market Definition Report* at 15.

The Commission would certainly not appear to further its twin goals of competition and diversity in *local* markets by counting against a group owner's local ownership allowance stations that it owns in *other* communities. Indeed, the apparent purpose served by counting distantly-located stations toward an applicant's local ownership limits would be to cut back on the allowable level of consolidation in the radio industry. For the reasons stated above, such a goal is contrary to the clear intent of Congress and must not be the motivation behind any change in the Commission's market definition policies. *See supra* Section I.

In sum, the Commission has not established "the requisite 'reasoned basis' for altering its long-established policy" for counting radio stations in a market. *ACT*, 821 F.2d at 746. The *Notice*'s failure to explain how the Commission's core competition and diversity concerns would be served by altering its station counting methods is particularly troubling in light of the anomalous effects that "adding" to the "numerator" would produce in the marketplace. *See Market Definition Report* at 15, 17. Given the lack of evidence demonstrating that changes in the FCC's radio market definitions would result in discernible regulatory improvement, the Commission should refrain from replacing its long-standing station counting methods that thousands of radio station owners have reasonably relied upon for nearly a decade.

IV. Any Change In Market Definition Should Not Affect The Transferability Of Existing Station Groups.

If the Commission in this proceeding were to alter its market definition policies to resolve the numerator/denominator question or for any other reason, the Commission will clearly need to address the issues of grandfathering and transferability. *See supra* Section II.B. As the Commission contemplated, and for the reasons stated in the *Notice* (at ¶ 13), any new market definition rules adopted in this proceeding should not be applied retroactively to existing station combinations. Any other decision would be manifestly unfair to station owners who formed combinations "in accordance with applicable Commission rules and policies," and would cause unacceptable disruption in the radio industry. *Notice* at ¶ 13.

But beyond grandfathering existing ownership combinations, the Commission should also refrain from requiring multiple owners to break up their station groups upon transfer, even if application of the FCC's revised market definition would make an existing station group exceed the numerical limit. The sale of an existing combination cannot, after all, adversely impact the level of competition and diversity in a local market. Indeed, the forced separation of commonly owned stations could negatively affect service to the public in the local market because the economic efficiencies associated with joint ownership – and the programming and other benefits made possible by those cost savings – would be lost. Moreover, spinning off a station that has become part of a consolidated group can cause considerable practical difficulty and economic hardship for station owners. Commonly owned stations usually have consolidated operations, personnel and equipment, and, for obvious reasons, it is difficult to spin off separately a station that no longer has its own studio and equipment.

Presumably, it was considerations such as these that lead the Commission in the *1992 Order* and *1992 Reconsideration* to *not* require the break up of station groups upon transfer or assignment.[44] NAB strongly asserts that the Commission should follow its own precedent, and recognize that requiring the break up of lawfully assembled station combinations upon transfer unfairly penalizes station owners. The reasonable expectations of group owners who assembled

[44] In these orders, the Commission determined not to "require a multiple owner which acquired its stations in compliance with the audience share and numerical station limits . . . to break up its station group upon transfer or assignment because the combined share of the group has grown to a level exceeding the [audience share] limit or the applicable numerical limit has changed." *1992 Order*, 7 FCC Rcd at 2783.

station combinations in reliance on the Commission's well-established and seemingly settled methods of applying the multiple ownership rules should not be overturned at this juncture.

V. Conclusion

For all the reasons described in detail above, the Commission should proceed cautiously in changing its well-established methodologies for defining radio markets and counting stations in them. As an initial matter, altering these policies may be contrary to congressional intent, particularly if these alterations were to effectively reduce the level of station consolidation that Congress expressly approved in the 1996 Act.

Moreover, changing the Commission's radio market definitions would not necessarily result in any discernible regulatory improvement. A new or modified market definition would produce its own anomalies and would raise other competition and fairness problems, especially with regard to the grandfathering of existing station combinations and the transfer of existing groups.

In particular, the Commission should reject its proposal to discard its contour overlap market definition in favor of Arbitron metro market definitions. Approximately half of the radio stations in the U.S. are not located in Arbitron markets, and Arbitron data lack the neutrality and consistency needed for data to be used as a regulatory tool.

The Commission has also failed to make an affirmative case for rejecting its current approach in favor of any of the other proposed options, as the *Notice* did not explain how those options would better serve the FCC's core competition and diversity concerns. The available evidence indicates that one of the proposals offered for resolving a perceived counting inconsistency would particularly have the potential to create significant new anomalies in the counting of stations that any single entity is deemed to own in a market.

If the Commission, however, were to alter its market definition policies in any way, the Commission will need to provide for the grandfathering of existing station combinations. The Commission should also recognize that requiring the break up of lawfully assembled station combinations upon transfer unfairly penalizes station owners.

Respectfully submitted,

NATIONAL ASSOCIATION OF BROADCASTERS
1771 N Street, NW
Washington, DC 20036
(202) 429-5430

Jerianne Timmerman

Henry L. Baumann
Jack N. Goodman
Jerianne Timmerman

David Gunzerath, Ph.D.
NAB Research and Planning

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